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Office-Supreme Court, U.S.
FILED
MAY 29 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 59

SAM THOMPSON, - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 884

SAM THOMPSON, - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

May it please the Court:

The respondents, in their brief, do not question the importance of the questions raised but offer two arguments which require a word in reply.

First: The respondents say that petitioner has not exhausted his state remedies. But in the *habeas corpus* proceeding which was ancillary to the present case, the Kentucky Court of Appeals has explicitly held otherwise (Appendix B to Petition for Certiorari, p. 38):*

> "Appellee [petitioner] appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the

*To the same effect, see the opinion of Circuit Judge Grauman (*id.*, p. 30): "Petitioner has no remedy in the Kentucky courts."

> Federal Constitution, *yet this substantive right cannot be tested unless we grant him a stay of execution* * * *." (Emphasis added.)

The Court's opinion shows that relief on the merits under § 110 of the Kentucky Constitution was precluded by *Walters* v. *Fowler,* Ky., 280 S. W. 2d 523 (1955), and other Kentucky precedents. Indeed, this is the whole premise of the Court's ruling in the *habeas corpus* appeal. Had there been an opportunity for substantive review of the due process questions in any state court, the Court of Appeals would have had no reason to grant the stay of execution pending review by this Court.

In this connection it is to be noted that the Court of Appeals itself, on its own motion, brought § 110 into the case as a basis for the stay of execution. If it had thought that § 110 afforded an avenue for redress of the due process violations it would have said so and denied the stay. Instead, as the above quotation shows, it said exactly the opposite.

It is also to be noted that the respondents' contention as to the availability of § 110 represents a change of position on their part. They did not make this argument in the Court of Appeals, but contended there that no state court review could be had (Memorandum of Oral Argument, pp. 3-4):

> "The Court has reiterated that the right of appeal—in criminal cases or otherwise—is not a natural or inherent right, but is purely a creature of statute and a matter of grace. See 6 Ky. Dig.,

Criminal Law, Sec. 1004, and cases cited. Nor will this Court permit the equivalent of an appeal in a 'backhanded way.' Smith v. Henson, supra. Mason [*sic.* Merson] v. Muir, Ky., 284 S. W. 2d 811."

As has been seen, the Court of Appeals agreed with the respondents on this point. It is hardly consistent for them to contend now that review under § 110 was available.

Second: The respondents in their "Analysis of Record" seek to make it appear that this case involves issues of credibility. Our petition carefully excludes all such questions. It is our position that, assuming all the prosecution's evidence to be true, it is clearly insufficient to support these criminal convictions. (See Petition for Certiorari, pp. 15-16.)

Respectfully submitted,

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